THE THEORY OF INHERITANCE.[1]

THE foundation of Bentham's attack on the Jurisprudence of his time was its inaptness for its own acknowledged ends. Laws and courts were admittedly established to secure rights of person and of property; and yet it was obvious that in many cases, owing to the undue importance given to forms of procedure, the merits of the contest were never passed upon and the property of the litigants became the spoil of the successful pleader. Forms and rules were of course necessary in the administration of justice; it was desirable, too, that they should be consistent. But as Bentham pointed out, the lawyers in striving for the minor virtues of consistency and formality were constantly committing the deadly sin of injustice. In working out the system of pleading they forgot that the first test was how well it secured justice; that consistency was of only secondary importance.

Many laws of to-day are open to the same sort of criticism, that they overpass the reasons for them. It is, for instance, highly desirable "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Art. I. Constitution U. S., sec. 8. The admitted object of granting patents is to benefit the public by encouraging inventors. That this advantage should be secured as cheaply as possible no one, I suppose, will deny. And yet, though no end attainable by granting patents would be defeated by a condition giving the government a right to purchase and cancel any patent at some fixed price, we issue them without restrictions, and present unnecessarily and unreasonably to individuals rights which should be reserved to the public.

The most striking example, however, of such unreasoning legislation is seen in the law regulating the succession to property on the death of the owner. In everyday affairs no laws are of more importance; yet they have received but little attention, and their underlying principles seem to be but imperfectly understood or acted upon. Hale and Blackstone denied that any such principles existed, and asserted that inheritance was a mere matter of legislative caprice;[2] Coke explained that the descent of property followed what we should call the law of gravitation. The feudal laws of

[1] This article is the Law Part at the last Harvard Commencement, and is reprinted substantially as spoken. No effort was made to collect the authorities on the subject.

[2] Hale, Hist. Com. Law, 301 n., 320; Bl. Com. Bk. 2, ch. 1; Coke Ins. L. 3, ch. 6, § 385; Co. Litt. 18 b.; Mass. Gen. Sts. 1873, ch. 91, § 1.

descent entirely ignored any national right to inherit; and in Massachusetts, till within twenty years, the father of a person dying without lineal issue took to the entire exclusion of the mother.

The actual transmission of estate by will certainly rest on nothing deeper than statutory law.[1] "The power to dispose of property by will is neither a natural nor a constitutional right, but depends wholly on statute," says Chief Justice Gray of Massachusetts (100 Mass. 235). And it seems that the same is true of descent. For the heir has no claim which the ancestor cannot disregard; he takes only as the statutes provide; these statutes vary greatly in different States, and have often been changed and heirs disinherited, without any constitutional question being raised; and generally the whole estate is, if not more than a certain amount, confiscated and given to the widow.

"The legislature may to-morrow, if it pleases," says the Supreme Court of Virginia, "absolutely repeal the Statute of Wills, and that of Descents and Distributions, and declare that upon the death of a party his property shall be applied to the payment of his debts, and the residue appropriated to public uses." Eyre *v.* Jacobs, 14 Grat. 328.

In this country it is usually provided that the owner of property may, by a will executed with certain required formalities, direct to whom all his property shall go on his decease. This extraordinary power which, as Sir Henry Maine says, "implies the greatest latitude ever given in the history of the world to the volition or caprice of the individual," is subject to but one restriction; a husband cannot by will deprive his wife of that share of his property to which the law thinks her justly entitled. Nor can a wife deprive her husband of his share in her estate. In all other particulars, with some unimportant limitations, the power of the testator is absolute. A child may be brought up in luxury and turned out on the world without a penny; the entire fortune may be left to trustees and kept intact for nearly one hundred years; it may be tied up in charities, with direction how every cent shall be spent to the end of time; finally, it may be so left that it shall be free from seizure by the creditors of the devisee, and even that provision will be respected. So that we see the strange spectacle of men enjoying large income while their butchers and grocers go unpaid. If the owner does not make a will, our statutes then provide that his whole estate shall be divided equally among his nearest relatives, no matter how remote they may be.

Now, though wills and descents be creatures of positive law, it

[1] 104 N. Y. 306; Montesquieu, Esprit des Loix, liv. 27, § 1.

by no means follows that there are not underlying principles of law and policy to which they should conform. And I wish, in the few moments at my disposal, to direct your attention to what these principles are, and how far they are recognized by existing laws. I shall then consider briefly a class of legislation which is at present attracting much attention, the so-called Collateral Inheritance Taxes.

What should be the purpose of laws regulating the succession to property on the death of the owner? Fortunately this question, which would involve going into the fundamentals of Economics, has been answered many times, and by men of widely different views, with substantial unanimity. Mill,[1] Bentham,[2] and even Professor Ely,[3] who are in general as far apart as any three men that could be named, all agree on certain general principles to which the law should conform in distributing the estates of deceased persons. It seems fair to assume their conclusion to be correct; it never, to my knowledge has been questioned.

The law, they tell us, should aim, first, to consider the wishes of the former owner; second, to secure adequate provision to his family and those dependent on him; third, to promote the equalization of fortunes, it being manifestly out of keeping with democratic ideas for the State to foster the concentration of wealth. These propositions are by no means of equal importance. Mill and Bentham, for instance, almost ignore the first, and Professor Ely regards it of much less weight than either of the others.

A scientific law of succession, therefore, while not blind to what the owner's wishes would have been, will regard them with much less consideration than it will be the rights either of his family or of the rest of the community. How far do our present laws conform to these ideas? By what method of reasoning do we reach the astonishing result that if a man die intestate, leaving an only son, the latter will take the entire estate, whether it be one hundred dollars or one hundred millions; while on the other hand, the father may at his pleasure leave his whole property to a charity, and throw the son on the world a pauper?

Our laws of succession are in their origin feudal, and to answer these questions we must glance shortly at the feudal system from which they started. Now the feudal idea was in brief this: At the head of everything the king; numerous noblemen holding large tracts of land under the king, whom they repaid by service

[1] Principles of Pol. Econ. Bk. 2, ch. 2, § 3.
[2] Principles of the Civil Code, part 2, ch. 3.
[3] 153 No. Am. Rev. 54

in war and otherwise; villeins, who held and worked the land of the nobleman. Everything turned on the land. The fundamental idea was that there should always be some one ready to perform the various services which the land was supposed to owe. This governing principle was especially evident in the laws of succession after death.[1] The land went to the eldest son, not because as a *child* he had any right to it, for the youngest son and the daughters were as near relatives, but because he was presumably better qualified to perform the services, and it was therefore for the lord's interest to have him succeed. A father could not inherit from his son; females took nothing while there were living males of the same degree of relationship; and the second son nothing so long as his elder brother was alive. About 1540, a statute made all lands devisable by will. The object of the statute, however, was not to enable the owner to distribute his land, but to give him power to disinherit an incompetent eldest son and leave all the property to the one best fitted to keep up the family prestige.[2] At this point the English law remained practically stationary till 1825.

Such were the laws of England when our forefathers came to this country. They were designed to protect an hereditary aristocracy, and many of their provisions were so evidently out of keeping with democratic ideas that the colonists never adopted them in full, — primogeniture, for instance, and distinctions of sex, — though for many years the eldest son took a double portion.[3] Our present law is the result of many modifications of the English, but its underlying principles, so far as it can be said to have any, are still those of feudal England. In no other way can we explain laws which allow any relative, however remote, to take the whole estate, and yet leave to the owner the option of excluding his own child, for no better reason than because it is his whim to do so. It seems to me high time that the absurdity and injustice of such laws were pointed out, and that our laws of succession after death were made more conformable to what is admittedly their true theory. It is time that we recognized, on the one hand, the right of the child is not to be disinherited without cause; and on the other hand, that no mere relationship to the deceased can give one person the right to millions of dollars which was the property of another and is now at the disposal of the State.

[1] Dalrymple, Essay on Feuds, Chapter on Succession; Wright on Tenures; Du Cange, Glossarium, tit. "Beneficium" and Feudum; Beames's Glanvill, pp. 1, 47.

[2] 6 Glasson, Droits, &c. de l'Angleterre, 234 *et seq.*; Bl. Com. Bk. 2, ch. "Devise;" Beames's Glanvill, 140, n.; Mill, Pol. Econ. Bk. 2, ch. 2, § 4; 40 Edin. Rev. 350.

[3] Body of Liberties, §§ 81, 83.

That last clause contains, I think, the key to the problem. A dead man's property is at the disposal of the State. All laws regulating successions after death are, Blackstone tells us, creatures of civil policy. The son has by nature no right to succeed to his father's land, nor is the father by nature entitled to direct the succession to his property after his own decease. He who would take it must establish his claim. And on the three principles from which we started, the child is entitled to a portion. But it by no means follows that he is entitled to the whole. The same reasoning which leads us to think that he ought to have a share of the property also indicates how large that share ought to be. On the one side, he should not be left in poverty; on the other, the good of the State requires that he should not be permitted to live in idleness. To so much he is entitled on all principles of natural right and civil policy, and to no more. These are elastic limits, and estimates of a child's proper share may, I suppose, vary from ten thousand dollars to one hundred thousand.

But when we come to the remote relatives, to a tenth cousin, for instance, on what ground will he rest his claim to the estate? "True, I never heard of this dead man," he must say, "until I was told that I was his next of kin. I never expected anything from him, nor should I have felt called upon in any way to assist him. But I am his nearest relative: give me the property." Surely a reasonable man would say, "You have not made out your case."

What, then, should become of the property? The answer is obvious; as no one has shown himself entitled to it the State should keep it.

I have not time elaborately to discuss the theory of wills. The general line of reasoning which I have suggested is even more applicable to them than to descent. The law has long held that a dead man could have no property, and that giving effect to his wishes is merely a bit of legal courtesy, so to speak. Gifts by will should, therefore, be valid only to a limited amount, and the rights of children should be protected, as those of the wife now are, beyond the power of the testator to destroy them. The French law has been in accord with these ideas ever since the Revolution of 1789.[1]

These suggestions seem very pertinent to the discussion at present going on over the advisability of Collateral Inheritance Taxes.

[1] Hale, Hist. Com. Law (Runnington's ed.), 314, n.; 40 Ed. Rev. 350; Beames's Glanvill, 139, n.

The general theory of such laws is to tax lightly, or not at all, transmissions of property to the immediate family of the deceased, increasing the tax as the relationship becomes more remote. A bill on these lines was introduced into the last session of Congress;[1] a similar measure is at present before the Supreme Judicial Court of Massachusetts. Such laws seem to me a movement, vague and indefinite to be sure, but still in the right direction. They are no new thing. The Roman Emperor Augustus enacted a tax of this sort in the year 6, which, Gibbon says, furnished a large part of the Roman revenue.[2] England has long had similar statutes, and in 1892, derived from them an income of upwards of fifty million dollars. Many of our States have followed suit. In 1892, one-third of all the State taxes of New York were collected in this way. Most interesting of all are the laws of Switzerland which provided for a maximum tax of 20 per cent., and amount to a conscious attempt to regulate the succession to property on the principles for which I have been arguing.

It will no doubt be objected that my suggestions are impracticable; that I am assailing the rights of private property; that a man will not work if he cannot leave his fortune to his children. To the first point, I will make answer that in the long run the law has proved as clever as those who would evade it, and has accomplished things at first sight much more difficult than this. At any rate, it should not let injustice go on without even attempting to remedy it. As for impairing the rights of private property, — surely no one would say that "The Principles of Political Economy," by Mr. John Stuart Mill, was a sensational work. Yet Mr. Mill takes pains to explain that descent on the death of the owner is not an incident of private property.[3] Starting from the side of the economist, he arrives at the same result which I have suggested from a lawyer's point of view.

To those who would cry that I discourage men from working, this answer can be made: the average American family consists of five members; if we assume that each individual may rightly inherit from $50,000 to $100,000 this objection will have no force till a man is worth from two hundred to four hundred thousand dollars, for to that amount his property will go exactly as he would have it. And I do not regard it as an unalleviated misfortune, if here in the United States of America, some men with four hundred thousand dollars should be driven — though I

[1] Harper's Weekly, 6th January, 1894.
[2] Gibbon, ch. 6.
[3] Pol. Econ. Bk. 2, ch. 2.

do not believe they would be — into something besides money-making; into municipal affairs, for instance, or into charities, or even into enjoying themselves a little before their nervous prostration period comes. Surely too it is not worth while to purchase the labor of one generation with the idleness of all that are to come after.

It will perhaps be felt that I speak too speculatively and underrate the so called "natural right" to inherit. Against other individuals the child (or near relative) certainly has a paramount title, because the deceased would have wished the property to go to him, and other things being equal the wishes of the former owner should prevail, as we have seen. But the contest is not between the child and another person; it is between the child and the State, and the owner's wishes have never been allowed to override the dictates of public policy. The feudal law utterly disregarded them in order to concentrate property and preserve family power; the State of to-day may rightly disregard them to secure the distribution of wealth. For the most important aspect of great fortunes is not the luxury which they engender, nor yet the envy and discontent which they excite; it is the tremendous power which they give over men, and — it seems — over nations. We may well hesitate about depriving a man of what he himself has fought for and won by his ability or his luck. But to make his conquest hereditary, to put this enormous influence into the hands of a man who may be entirely unfitted for it, violates every principle of law and policy for which the government stands.

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[Since this article was in proof the opinion has been handed down by the Supreme Judical Court of Massachusetts in the Collateral Inheritance Tax Cases. It is believed that nothing there decided affects any of the positions which have been assumed in the foregoing discussion. But the learned Chief Justice appears to go out of his way to express his opinion that there is a right of inheritance or of handing down by descent — he is quite uncertain which — so protected by the Constitution that the State cannot destroy it by taxation. To be sure Chief Justice Marshall in McCulloch *v.* Maryland said (4 Wheaton, 427, 428), that the power to tax implied the power to destroy. But that case has been somewhat shaken, and there is authority for the proposition that a State cannot do indirectly what it cannot directly. The learned Chief Justice of Massachusetts must however assume a common-law right of some sort, either to transmit or to inherit property on the death of the owner. With great deference I feel confident that such a position is untenable without abandoning many statutes never heretofore questioned on constitutional grounds. Moreover, the common law of estates *pur autre vie* seems conclusively to show that, as to land at least, there was no common-law right in the relatives of a dead man to succeed to his property. For on a grant to A for the life of B, if A die leaving B, the land did not descend to A's relatives but went as *bonum vacans* to the occupant. 2 Bacon's Abr. 561; Co. Litt. Lib. 1, sec. 56.]